

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AMERICAN GROUND
TRANSPORTATION, INC. et al.,
Plaintiffs,
v.
THE UNITED STATES MARINE
CORPS. COMMUNITY SERVICES et
al.,
Defendants.

Case No.: 19-CV-539-CAB-AHG

**ORDER GRANTING IN PART
MOTION TO DISMISS AND
TRANSFERRING ACTION TO
UNITED STATES COURT OF
FEDERAL CLAIMS**

[Doc. No. 12]

Before the Court is the Federal Defendants’ motion to dismiss Plaintiffs’ complaint for lack of subject matter jurisdiction, improper venue, and failure to state a claim. [Doc. No. 12.] The motion has been fully briefed and the Court deems it suitable for determination on the papers submitted and without oral argument. *See* S.D. Cal. CivLR 7.1(d)(1). For the reasons set forth below, the Federal Defendants’ motion is granted in part and this case is transferred to the United States Court of Federal Claims.

I. BACKGROUND

Plaintiffs American Ground Transportation, Inc. (“AGT”) and Liberty Launch, Inc. (“LLI”) (collectively “Plaintiffs”) filed this complaint on March 21, 2019, against the

1 following federal agencies and employees: The United States Marine Corps. Community
2 Services, The Marine Corps Installations West, Marine Corps Base Camp Pendleton
3 Armed Forces Disciplinary Control Board, R.C. German, Jr., Department of Defense,
4 Michael C. Dittamo, R.A. Scott, Steven Garbutt, John Kyle, David Busby (collectively the
5 “Federal Defendants”), and against the following corporation and individuals: Kevin Kohl
6 and Associates, LLC, Kevin R. Kohl, Reza Falahi (collectively the “Private Defendants.”).
7 [Doc. No. 1.]

8 According to the complaint, after submitting an application in response to a request
9 for proposal in May 2010, Plaintiffs were awarded the only contract pursuant to that request
10 and thereby entered into a written concession agreement (the “Contract”), designated as
11 Contract #PNM10-C-0030, with the Marine Corps Community Services (“MCCS”), of the
12 United States Government, on or about December 13, 2010. [*Id.* at ¶¶ 20–21.¹] Pursuant
13 to this Contract, Plaintiffs operated on the Marine Corps Base West to pick up and transport
14 shuttle van and taxicab customers from Camp Pendleton. [*Id.* at ¶ 2.] In consideration of
15 the award, Plaintiffs agreed to pay MCCS the commission amounts counter-proposed by
16 the MCCS, which began at 5% of the net sales commissions, and grew by 1% per year, up
17 to a total of 9%. [*Id.* at ¶ 22.] According to Plaintiffs, beginning in or about 2011 and
18 continuing to this day, the Federal and Private Defendants allowed other individuals and
19 entities to interfere with Plaintiffs’ rights under the Contract to offer taxicab and shuttle
20 van services from Camp Pendleton. [*Id.* at ¶ 27.]

21 Among other things, Plaintiffs allege that the Private Defendants, who also operate
22 transport services at Camp Pendleton as Sea Breeze Shuttle, would tell customers they were
23 not allowed to use Plaintiffs’ transport services, tell customers Plaintiffs did not have the
24 proper licenses or contracts to make pick ups at Camp Pendleton, intimidate or harass
25 Plaintiffs’ drivers, and submit false reports of Plaintiffs’ alleged wrongdoing, all in an
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28 ¹ Document numbers and page references are to those assigned by CM/ECF for the docket entry.

1 effort to re-direct customers away from Plaintiffs and to the Private Defendants' transport
2 services instead. [*Id.*]

3 Plaintiffs' principal met with its MCCS representative, an MCCS Officer at Camp
4 Pendleton, to discuss these issues, who suggested Plaintiffs should be relived of any duty
5 to pay commissions to the MCCS under the Contract. [*Id.* at ¶ 28.] Thereafter, Plaintiffs
6 received a letter from MCCS advising Plaintiffs they would be receiving an automatic six-
7 month extension of the Contract without the need to execute any additional paperwork, and
8 without the need to pay any commissions. [*Id.*] Thereafter, in June 2017, MCCS issued
9 an Order to ban Plaintiff LLI from Camp Pendleton. [*Id.* at ¶ 31.] Although Plaintiff
10 AGT's taxicab operations were not the subject of that Order, they too were denied access
11 for an approximate two-week period. [*Id.*] Plaintiffs allege that to this day that Order was
12 never served on either of them, but instead they learned of it indirectly when some of the
13 Private Defendants who had copies of the Order purported to read it aloud to Plaintiffs'
14 drivers. [*Id.*]

15 Plaintiffs allege they have followed the designated administrative review processes
16 for their complaints to the best of their knowledge and ability, as well as attended several
17 meetings and hearings with MCCS representatives. [*Id.* at ¶ 32.] On September 22, 2018,
18 Plaintiffs served their certified claim pursuant to 41 U.S.C. § 7101 *et seq.*, on all of the
19 MCCS representatives. [*Id.*] On or about January 24, 2019, Plaintiffs received MCCS'
20 reply, and thereafter, Plaintiffs' and MCCS' counsel engaged in additional correspondence.
21 [*Id.*] Plaintiffs interpret the reply and MCCS counsel's subsequent correspondence as a
22 denial of their claim and believe they have fulfilled their administrative duties prior to
23 bringing the pending action in this Court. [*Id.*] Plaintiffs' complaint alleges claims against
24 the Federal and Private Defendants for breach of the implied covenant of good faith and
25 fair dealing, violation of unfair competition law, intentional interference with prospective
26 economic relations, negligent interference with prospective economic relations, intentional
27 interference with contractual relations, and negligence.
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II. APPLICABLE LAW

“The United States, as sovereign, is immune from suit save as it consents to be sued.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Two waivers of sovereign immunity are pertinent here. First, the Federal Tort Claims Act (“FTCA”) waives the United States’ immunity “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). Second, the Tucker Act waives the United States’ immunity and bestows exclusive jurisdiction on the Court of Federal Claims (“COFC”) in all actions “founded . . . upon any express or implied contract with the United States . . . in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). Unlike with FTCA causes of action, “[i]t has long been established that the law to be applied in construing or applying provisions of government contracts is federal, not state law.” *Woodbury v. United States*, 313 F.2d 291, 295 (9th Cir. 1963).

The Contract Disputes Act (“CDA”), enacted in 1978, covers any claim based upon “any express or implied contract . . . made by an executive agency for—(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property.” 41 U.S.C. § 7102(a). Under the CDA, “procurement” means “the acquisition by purchase, lease or barter, of property or services for the direct benefit or use of the Federal Government.” *New Era Constr. v. United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989) (quotation and emphasis omitted). The CDA sets forth its own jurisdictional requirements. *See M. Maropakos Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327–28 (Fed. Cir. 2010). Under the CDA, claims by a government contractor against the United States must first be the subject of a decision by the contracting officer, defined as “any person who . . . has the authority to make and administer contracts and to make determinations and findings with respect to contracts.” 41 U.S.C. §§ 7101, 7103.

1 The decision by the contracting officer may be appealed to an agency board of contract
2 appeals or to the United States Court of Federal Claims. 41 U.S.C. §§ 7103, 7104. Further
3 appeals from these bodies must be filed with the United States Court of Appeals for the
4 Federal Circuit. 41 U.S.C. § 7107; *see United States v. Rockwell Int'l. Corp.*, 795 F.Supp.
5 1131, 1134 (N.D. Ga. 1992).

6 To determine if the CDA applies, the Court must look to whether the dispute at issue
7 is one of contract. *See Ingersoll–Rand Co. v. United States*, 780 F.2d 74, 76 (D.C. Cir.
8 1985). The court in *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982), explained
9 that courts should attempt “to make rational distinctions between actions sounding
10 genuinely in contract and those based on truly independent legal grounds.” 672 F.2d at
11 969–70. The *Megapulse* court further noted that, when examining “competing”
12 jurisdictional bases, the issue is “to determine if the claim so clearly presents a disguised
13 contract action that jurisdiction over the matter is properly limited to the Court of Claims.”
14 *Id.* at 968. It is well-established that disguised contract actions may not escape the CDA.
15 *See, e.g., Ingersoll–Rand*, 780 F.2d at 77; *Am. Science & Eng., Inc. v. Califano*, 571 F.2d
16 58, 61 (1st Cir. 1978). Neither contractors nor the government may bring a contract action
17 in federal district court simply by recasting claims in tort language or as some statutory or
18 regulatory violation. *See Sealtite Corp. v. General Services Admin.*, 614 F.Supp. 352, 354
19 (D. Colo. 1985) (rejecting attempt to “circumvent the [CDA] by characterizing dispute as
20 an action in replevin”). Effective enforcement of the jurisdictional limits of the CDA
21 mandates that courts recognize contract actions that are dressed in tort clothing. *United*
22 *States v. J & E Salvage Co.*, 55 F.3d 985, 987–88 (4th Cir. 1995); *see also Dalton v.*
23 *Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1017 (Fed. Cir. 1995) (“When the Contract
24 Disputes Act applies, it provides the exclusive mechanism for dispute resolution; the
25 Contract Disputes Act was not designed to serve as an alternative administrative remedy,
26 available at the contractor’s option.”).

27 **III. DISCUSSION**

28 The Federal Defendants contend Plaintiffs claims allege a contract dispute against

1 the federal government which should be presented in the Court of Federal Claims pursuant
2 to the Contract Disputes Act and/or the Tucker Act. Plaintiffs respond that this is not a
3 contract dispute but a tort action and therefore this Court has jurisdiction under the Federal
4 Tort Claims Act. Further, Plaintiffs contend that this case also involves the wrongful acts
5 of the Private Defendants and that the Federal Defendants, who drafted the Contract, have
6 already admitted in writing that the Contract at issue here is a concessionaire contract that
7 is not subject to the CDA. Finally, Plaintiffs contend that any deficiency to the complaint
8 can be cured by amendment and if this case must proceed before the COFC then it should
9 be transferred, rather than dismissed. While the Federal Defendants also appear to move
10 to dismiss for failure to state a claim, their six-page motion and four-page reply almost
11 entirely addresses only the issue of jurisdiction. Accordingly, this Order addresses only
12 the issue of jurisdiction and does not make any findings as to the merits of Plaintiffs’
13 claims, any statute of limitations arguments, or whether any individual defendants must be
14 dismissed.

15 Plaintiffs first argue that this action is one in tort brought under the FTCA and not
16 under the CDA. The Court is not persuaded. It is not clear how the FTCA applies as the
17 complaint does not allege any injury or loss of property. Rather, a rational reading of
18 Plaintiffs’ claims necessarily requires the interpretation of Plaintiffs’ Contract with the
19 MCCA and its terms which appears to be an express contract made by an executive agency
20 for the procurement of services. Moreover, contractors with the government may not bring
21 contract actions in federal district court by recasting and disguising claims in tort language
22 or as statutory or regulatory violations. *See, e.g., Ingersoll–Rand*, 780 F.2d at 77; *see also*
23 *Sealtite Corp.*, 614 F.Supp. at 354. As Plaintiffs state in the complaint, “This action seeks
24 damages . . . arising out of a governmental concessions contract . . .” and “tort claims
25 arising from [the Contract].” [Doc. No. 1 at ¶¶ 1, 5.] Plaintiffs also contend that paragraph
26 37 of the complaint alleged compliance with the prerequisite for bringing an action under
27 the FTCA as set forth in 28 U.S.C. 2675(a). However, paragraph 37 of the complaint states,
28 “[Plaintiffs] served their [certified claim pursuant to] 41 U.S.C. [§] 7101 *et seq.*” which is

1 in fact in reference to the CDA and not the FTCA. [Doc. No. 1 at ¶ 37.] Further references
2 to the CDA and 41 U.S.C. § 7101 are attached to Plaintiffs’ complaint and the purported
3 certified claim. [*Id.* at 64, 66.]

4 Plaintiffs’ contention that the Federal Defendants’ should be bound by their written
5 admission that the Contract was a concession contract not subject to the CDA in accordance
6 with controlling law is erroneous. “[F]ederal courts are courts of limited jurisdiction . . .
7 empowered to hear only those cases that (1) are within the judicial power of the United
8 States, as defined in the Constitution, and (2) that have been entrusted to them by a
9 jurisdictional grant by Congress.” *United States v. Jacobo Castillo*, 496 F.3d 947, 951 (9th
10 Cir. 2007) (quoting 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,
11 FEDERAL PRACTICE AND PROCEDURE § 3522, at 60 (2d ed. 1984) (footnote omitted)).
12 Defects in the Court’s subject-matter jurisdiction “go to the inherent power of the court
13 and cannot be waived or forfeited.” *Jacobo Castillo*, 496 F.3d at 952. Although the Federal
14 Defendants’ previous assertions to the Plaintiffs that the Contract was not subject to the
15 CDA and the inclusion of such language within the Contract itself is indeed disconcerting,
16 such actions cannot bestow jurisdiction upon this Court. As stated in the same cases the
17 Federal Defendants improperly relied upon for their previous assertions, “only Congress
18 can waive sovereign immunity; parties may not by contract bestow jurisdiction on a court.”
19 *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1293–94 (Fed. Cir. 2002); *see also Ins. Corp. of*
20 *Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701–02 (1982) (“[Federal
21 court jurisdiction is] limited to those subjects encompassed within a statutory grant of
22 jurisdiction . . . [N]o action of the parties can confer subject matter jurisdiction upon a
23 federal court.”).

24 Furthermore, the cases relied upon that hold concession contracts are not subject to
25 the CDA are uninstructional. As a preliminary matter, the CDA does not distinguish between
26 concession and nonconcession contracts. These cases also rely on an inapplicable
27 regulation involving concession contracts with the National Park Service, *see Coffee*
28 *Connections, Inc. v. United States*, 113 Fed. Cl. 741, 751 (2013) (relying in part on 36

1 C.F.R. § 51.3, relating to concession contracts under the National Park Service Concession
2 Policies Act of 1965); *Terry v. United States*, 98 Fed. Cl. 736, 737 (2011) (same). The
3 Contract at issue in this case does not involve the National Park Service, and Plaintiffs have
4 not explained why regulations limited to the National Park Service Concession Policies
5 Act of 1965 should inform this Court's analysis.

6 Accordingly, Plaintiffs' claims cannot overcome this Court's lack of jurisdiction by
7 framing them as sounding in tort. The gravamen of Plaintiffs' claims relates to both the
8 Private and Federal Defendants' actions as they pertain to Plaintiffs' Contract with the
9 United States, and therefore jurisdiction exists exclusively with the COFC pursuant to the
10 CDA, or alternatively, the Tucker Act.

11 **IV. CONCLUSION**

12 For the reasons set forth above, the motion to dismiss is **GRANTED in part**² and
13 pursuant to 28 U.S.C. § 1631, the Clerk of Court **SHALL TRANSFER** this action to the
14 United States Court of Federal Claims.

15 It is **SO ORDERED**.

16 Dated: October 15, 2019



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18 Hon. Cathy Ann Bencivengo
19 United States District Judge
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28 ² Accordingly, the Court does not make any findings with respect to the merits of Plaintiffs' allegations,
any statute of limitations argument, or whether any individual defendants must be dismissed.